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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 46

SOUTHERN CONSTRUCTION COMPANY, INC., and CONTINENTAL CASUALTY COMPANY, *Petitioners*

v.

UNITED STATES TO THE USE OF SAMUEL J. PICKARD, D/B/A PICKARD ENGINEERING COMPANY, *Respondent*

BRIEF ON BEHALF OF RESPONDENT

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STATEMENT OF QUESTIONS PRESENTED

Involved here is Rule 13(a), Federal Rules of Civil Procedure, relating to compulsory counterclaims. Identical parties were involved first in a proceeding in the Federal Court in Georgia, later in the Federal Court in Tennessee. Petitioner filed a counterclaim in the first proceeding in Georgia, then later deliberately deleted one item of $35,000, from the Georgia counterclaim, for later use in Tennessee. The Court of Appeals for the Sixth Circuit has found that the item in

question arose out of the transaction which was the subject matter of the suit filed in Georgia, within the meaning of the Rule.

Respondent states that under Rule 13(a), which is mandatory, petitioner could not deliberately divide the items of its counterclaim; that it was bound to file its counterclaim in full in the first Georgia proceeding, which it did; and that any item subsequently deleted was thereafter barred for all purposes. It was *res judicata* in the subsequent Tennessee proceeding. The Court of Appeals for the Sixth Circuit has so ruled, and the question presented is whether this ruling was correct.

STATEMENT OF THE CASE

This is essentially a contract proceeding involving a government contract for rehabilitation of certain barracks at Fort Benning, Georgia, and Fort Campbell, Tennessee. Respondent subcontracted to do the mechanical work at both places for petitioner Southern Construction Company, which was the prime contractor with the government.

On the theory it had not been fully compensated, respondent instituted proceedings under the Miller Act (Aug. 24, 1935, Ch. 642, 49 Stat. 793, Title 40, secs. 270(a)-270(d)) against the prime contractor, and its surety, first on December 26, 1956, in the United States District Court for the Middle District of Georgia, and later on April 4, 1957, in the United States District Court for the Middle District of Tennessee. (R. 29, 81, 1) The statute required the proceedings to be separate, as it provides suit must be instituted in the District where the work was performed, and "nowhere else." The present controversy revolves around a

counterclaim asserted by petitioner in these proceedings, and the proper application of the compulsory counterclaim rule (Rule 13(a), Federal Rules of Civil Procedure) to the counterclaim. It has been respondent's position that the item in question could only be entertained by the Georgia Court; petitioner has attempted to prove it in the Tennessee proceeding.

The Georgia case was tried first in March, 1959, before a jury, and resulted in a general verdict for respondent. Judgment was entered on March 18, 1959, and a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial was promptly filed by petitioner. On March 31st of the following year the Georgia Court granted the motion N.O.V., and entered judgment for petitioner. As to the motion for a new trial, the Court at the same time said: "The Court makes no ruling at this time on the defendants' motion for a new trial on the main case nor on the defendants' motion for a new trial on the counterclaim." (R. 45) The motion for a new trial on the counterclaim was recently granted, and proceedings on the counterclaim are presently in progress in the Georgia court.

The case in Tennessee was tried in Nashville, in October, 1959, and was tried before a jury, to which special questions were submitted, with the exception that the issue pertaining to the counterclaim was tried exclusively before the Court by agreement of counsel. The findings of the jury on the questions submitted to it were favorable to respondent (R. 10), whereupon petitioner filed a motion for judgment N.O.V., and for a directed verdict. By the terms of the Court's findings of fact and conclusions of law relating to the counterclaim, it became unnecessary for the Court to rule

on this motion, as its findings and conclusions pertaining to the counterclaim led to a judgment for petitioners. (R. 116-121) Respondent filed a motion for amendment of the findings of fact and conclusions of law, which was denied. (R. 61) Respondent appealed to the Court of Appeals for the Sixth Circuit, which reversed the lower court ruling that allowed the counterclaim, vacated the judgment, and remanded the case for further proceedings consistent with its views. (R. 178-182) Petitioner sought certiorari to this Court, which was granted.

The record in this proceeding shows there were three separate contracts between respondent and petitioner at Fort Benning, Georgia, totalling $513,075.11. There was one contract at Fort Campbell, Tennessee, at a contract price of $50,000. The largest single supplier for respondent on both projects was Atlas Supply Company of Atlanta, Georgia. When plaintiff's work was terminated on both jobs, in January, 1957, Atlas was owed on both jobs a total of $139,492.06, the figures being $104,971.12 for deliveries to the Benning job, and $34,520.94 for deliveries to the Campbell job, for which sums respondent was and is primarily liable, and petitioner had a contingent liability under the terms of the Miller Act. (R. 107, 172) To discharge its own liability, but not the liability of respondent, petitioner, on August 28, 1957, eight months after the work was terminated, settled the entire account by a payment to Atlas of $35,000, and it is around this item that the present controversy centers. (R. 27, 28)

Atlas carried this account of the plaintiff on its books as one single, indivisible account at the time the $35,000 settlement payment was made. (R. 173, 108)

The evidence shows that the sum of $35,000 was paid in settlement of the total amount. It is so stated in the

release that was delivered in return for the check. (R. 27, 28). The witnesses for petitioner, as well as its counsel, admit that there never was any attempt to allocate this item of $35,000 to the Fort Campbell account as distinguished from the Fort Benning account. (R. 14, 18, 118) On the contrary, the evidence shows that sometime after the Tennessee suit had been filed (April 4, 1957) counsel for petitioner addressed a letter to counsel for respondent (April 15, 1957) in which it was stated that, "This was an over-all lump sum settlement, and we are unable to allocate this amount as between Fort Campbell and Fort Benning." (R. 22)

The facts surrounding the filing and proving of the counterclaim are as follows—first so far as the pleadings in both cases are concerned: In the counterclaim that was originally filed in the Georgia suit, on January 30, 1957, the $35,000 item was included. (R. 109, 173, 174) Thereafter on August 5, 1958, defendants filed a motion for summary judgment in the Georgia case as to "the three contracts at Fort Benning." (R. 45) In Paragraph III of this motion, summary judgment is requested on the counterclaim as originally filed. There is no amendment or deletion to the counterclaim, even though the motion itself is confined to the "three contracts at Fort Benning." (R. 47) In support of this motion affidavits were filed by petitioner stating that the $35,000 was paid "in full satisfaction of a total claimed invoice by Atlas in the amount of $104,917.12," which was the exact amount of the Benning deliveries, exclusive of the Campbell deliveries. (R. 51) It is clear that at this juncture in the Georgia proceedings the defendants were seeking to apply the $35,000 payment to the Benning contract, and were seeking judgment on their pending counterclaim ac-

cordingly. It is true that a short time later an additional more voluminous and separate motion for summary judgment on the counterclaim was filed in the Georgia case, wherein a reduction in the total contract figures would seem to indicate that the item in question was being omitted, but, here too, there was no corresponding reduction in the amount of the counterclaim itself, and as it was set forth in the original pleading. (R. 35) It is also true that an exhibit subsequently introduced by petitioner at the Georgia trial does not include this item. In summary, it can thus be said that so far as the pleadings in the Georgia case are concerned, the item of $35,000 was included to the end; also, it was affirmatively pursued in the Georgia proceeding at least until the time of the first motion for summary judgment. Indeed, even the pre-trial statement signed a few days before the Georgia trial, leaves defendants intentions in some doubt. In the pre-trial statement, defendant amends its counterclaim and seems to include the Fort Campbell contract money within the terms of the amended counterclaim. (R. 41, 151)

Petitioner says it did not ultimately "claim" the item of $35,000 in the Georgia case, and that it did not do so, solely on the advice of its attorney; their attorney so testified in this proceeding. (R. 18) He testified that somewhere along the line he decided and advised his clients that they should delete the item from the Georgia case and claim the entire amount in the Tennessee proceeding, but he cannot say just when he did so, except that it was "sometime between April of 1957 and August of 1958." (R. 143)

This suit was filed in Tennessee on April 4, 1957. It was not until the pre-trial hearing in the Tennessee case shortly before the trial, on June 17, 1959, that peti-

tioner evidenced any clear-cut intention to split off the $35,000 for the purpose of asserting it in Tennessee. As a result of the pre-trial hearing, the defendant, on August 18, 1959, a few weeks before trial, amended its counterclaim with a computation hinged largely on the item of $35,000. (R. 18, 19) This was exactly four months after judgment had been entered against petitioner in the Georgia proceeding, on March 18, 1959, on the basis of the jury verdict. (R. 44) This action was followed up a few days before trial by a letter from counsel for petitioner dated September 14, 1959, addressed to counsel for respondent, in which he attempted to correct the advice contained in his previous communication of April 15, 1957 (R. 22), and in which he now stated that the item of $35,000 would be claimed in the forthcoming trial in Tennessee. (R. 24)

The Distrjct Court in Tennessee gave full weight to the counterclaim item of $35,000 in awarding judgment to petitioner. (R. 120) The judgment of the Court of Appeals for the Sixth Circuit reversing the lower court and remanding the case was entered on August 3, 1961. (R. 169) Rehearing was denied on August 30, 1961. (R. 182) On September 1, 1961, the Georgia Court entered an order granting petitioner's motion for a new trial on their counterclaim in the Georgia proceeding, the motion having been pending since the conclusion of the trial in that case on March 18, 1959. (Appendix "A", attached hereto). Certiorari in this case was granted on January 22, 1962. On March 2, 1962, petitioner filed an amendment to its existing counterclaim in the Georgia case for the sole purpose of expressly claiming and adding the $35,000 item; on the same date it filed a motion for summary judgment on the basis of the counterclaim as so amended, which mo-

tion for summary judgment is still pending in the Georgia proceeding. (Appendix "B" and Appendix "C", attached hereto) On August 2, 1962, the Georgia Court set the case for pre-trial on August 10, 1962, for the purpose of considering the counterclaim, as amended. (Appendix "D", attached hereto) This pre-trial hearing has since been postponed to a date to be hereafter fixed. The foregoing is the present status of the Georgia proceeding. It is suggested that the within appeal of petitioner may have been rendered moot by the current proceedings in the Georgia case.

SUMMARY OF ARGUMENT

The item in question is a compulsory counterclaim within the provisions of Rule 13(a), Federal Rules of Civil Procedure as it arose "out of the transaction" that was the subject matter of the suit filed in Georgia.

The applicability of the Rule is determined as of the date first responsive pleading was filed, which was in the Georgia proceeding. The compulsory character of the counterclaim was determined on that date.

The Rule has no application to the subsequently filed suit in Tennessee. For this reason, it cannot be held that for the purposes of the Rule, the previously filed counterclaim in Georgia may be regarded as a pending action for purposes of applying the Rule to the Tennessee case. The Georgia counterclaim thus cannot be made the basis for an exception to the compulsory rule.

There is no equity working in favor of the petitioner. The decision to delete the item in question from the counterclaim that had already been filed in Georgia was solely the decision of counsel who thought the item could be utilized to greater advantage in the Tennessee case. Moreover, petitioner has always maintained an

anchor to the windward in the Georgia case, which it has recently utilized by reinstating the item in question in current Georgia proceedings.

ARGUMENT

The Counterclaim Item in Question Is Clearly Within the Provisions of Rule 13(a)

To render a counterclaim compulsory in character, and thus subject to the provisions of Rule 13(a), it must first appear that it arose from the same transaction or occurrence as is involved in the main suit. This is the controlling, if not the only, consideration.

The District Court found that,

> "The Fort Campbell and the Fort Benning projects constituted distinct and separate transactions between the same parties; Southern and Pickard; yet this payment of $35,000 unquestionably pertained to both. Thus it is a claim or payment which grows out of both transactions and is common to both. It therefore 'arises out of' the transactions at both Fort Benning and Fort Campbell." (R. 118)

The Court of Appeals for the Sixth Circuit agreed: "We are of the opinion that this payment arose 'out of the transaction' which was the subject matter of the suit filed in the District Court in Georgia, within the meaning of the Rule." (R. 179)

We do not understand that petitioner seriously disputes these findings. In its present brief (Page 4) it says,

> "One payment [$35,000 item] which had been made by the defendant Southern Construction Company on behalf of Pickard pertained almost entirely to the Tennessee contract, but it did in-

volve also, to some extent, the Georgia contract, and was, at least to a limited extent, incidental to the Georgia contract as well as to the Tennessee contract."

It cannot be said that the controlling consideration involved in the application of the Rule is in serious dispute. It has been found, or conceded, on all sides, that the counterclaim item in question arose out of the subject-matter of the Georgia suit. Indeed, it arose to a large extent out of the Georgia transaction. The total amount settled by the payment in question was $139,492.06; of this amount $104,971.12 represented materials delivered by Atlas to Fort Benning, and only $34,520.94 for materials delivered to Fort Campbell. (R. 107) The percentages are 75.25 per cent owed on the Fort Benning account, and 24.75 on the Fort Campbell account.

The release given in return for the payment states that it was,

"for all claims of whatsoever kind or character, which claims are disputed and denied, arising out of, or in any way connected with, or which might arise hereafter out of, the rehabilitation of Barracks, Mess Halls and Bachelor's Quarters at Fort Campbell, Kentucky, and Fort Benning, Georgia * * *."

The meaning of the words "transaction or occurrence" has been defined many times, and it is always said the words should be given a flexible meaning. The test generally applied in determining whether a counterclaim is compulsory is whether there is a logical relationship between the claim and the counterclaim. *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 610, 70 L. Ed. 750, 756; *American Mills Co.* v. *American*

Surety Co., 260 U.S. 360, 365, 67 L. Ed. 306, 309; *Lesnik v. Public Industrial Corporation*, Cir. 2, 144 F (2) 968, 975; *United States v. Eastport Steamship Corp.*, Cir. 2, 255 F (2) 795, 804. Such a logical relationship clearly is present in this case between the counterclaim and the Georgia contract.

Where It Is Applicable the Rule Requires That the Counterclaim Be Filed With the First Responsive Pleading

The Rule states that,

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party * * *."

Applying this language to the present case, it means that petitioner was compelled to file its entire counterclaim, including the item in question, at the time it filed its Answer in the Georgia case, which, of course, it did. *A fortiori*, it means that petitioner was not permitted to later split off a portion of the counterclaim which it decided it could use to better advantage in a later proceeding.

Some light is thrown on the purpose of this language by examining its background. Rule 13(a) was amended in 1948, but before the amendment it read as follows:

> "Compulsory Counterclaims. A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

After amendment it read as follows:

> "Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

By the amendment, the words 'not the subject of a pending action' were stricken, the word 'filing' was changed to 'serving,' and the words, 'except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action' were added to the end of the paragraph. Of this change the Advisory Committee Note says:

> "The rewording of the subdivision in this respect insures against any undesirable possibility presented under the original rule whereby a party having a claim which would be the subject of a compulsory counterclaim could avoid stating it as such by bringing an independent action in another court after the commencement of the federal action but before serving his pleading in the federal action."

It is clear that the circumstances prevailing at the time of answering the first suit prevail, and any counterclaim growing out of the same transaction or occurrence as the main claim must be asserted at that time, or be forever barred. *A fortiori*, and item of a counterclaim deleted subsequent to the time such a counter-

claim is served, is forever barred. *United States* v. *Eastport Steamship Corp.*, Cir. 2, 255 F (2) 795, 805. Or to state it another way, the Rule is mandatory (*Pennsylvania R. Co.* v. *Musante-Phillips, Inc.*, 42 F. Supp. 340, 341), has the force and effect of a statute (*Amer. Graphaphone Co.* v. *Natl. Phono Co.*, 127 F. 349), and it applies not only to all items that were included in the Georgia proceeding, but also to all items that were available to petitioner when it served its answer and counterclaim in the Georgia case. "Failure to file the counterclaim is *res adjudicata* of the relief which might have been obtained thereby." *Switzer Bros.* v. *Lacklin*, Cir. 7, 207 F (2) 483, 488; *Cleveland* v. *Higgins*, Cir. 2, 148 F (2) 722, 724.

The Present Case Is No Exception to the General Rule

Rule 13(a) makes an exception where the subject matter of the potential counterclaim has already been made the subject of a pending action, but this exception has no application to this case. It will be noted that the language is that the counterclaim need not be filed, "if at the time the action *was commenced* the claim was the subject of another pending action." (Italics supplied) Here again the history of the Rule is of interest. By the 1948 amendment the wording of the Rule pertaining to pending actions was revised, and the Advisory Committee Note states that the language was changed to its present form to insure against the filing of a new action by a defendant, in place of the filing of a compulsory counterclaim.

The circumstances existing at the time the responsive pleading is filed prevail, and the filing of an answer and counterclaim in the first suit by no means sets up a "pending action" for the purposes of a later and subsequent suit, within the meaning of the excep-

tion stated in the Rule. At the time petitioner filed its answer in the Georgia suit, no other action was pending involving the same subject matter, or the same transaction or occurrence, and this is the moment that controls. This is when the Rule is applied. The Rule does not apply to the second suit, but only to the first. Since the Rule has no application to the subsequent Tennessee suit, there is no occasion to determine whether another suit was pending when the Tennessee action was filed. The requirements of the Rule were already exhausted, either for good or for bad, when the Tennessee suit was filed. It is suggested that the basic error of the District Court lies in the fact that it attempted to apply the Rule as of the time when the Tennessee case was filed, rather than when the responsive pleading was filed in the Georgia case. By so doing, the District Court likewise fell into the error of reasoning that since the counterclaim was pending in Georgia when the suit was later filed in Tennessee. There was a pending action within the exception stated in the Rule, and that being within the exception, petitioner could file the counterclaim in Tennessee as a permissive counterclaim if it saw fit to do so. The mere statement of this theory would seem to answer it, as compulsory counterclaims and permissive counterclaims are mutually exclusive; a given claim cannot be both. A compulsory counterclaim grows out of the same transaction; to be permissive the claim cannot grow out of the same transaction. Since the item in question grew out of the transaction involved in the Georgia suit, which was filed first, it was compulsory there, and it could not take on a permissive character in the later Tennessee proceeding.

The Existence of a Dispute Concerning the Claim Can Have No Bearing On the Application of the Rule

Petitioner has been at great pains to show that it challenged the validity of the Benning portion of the claim, but not the Campbell part. It is not clear how this would affect the application of the Rule, even if true. Nearly all claims are disputed—that is usually what makes them a claim. The fact that a claim may be vigorously disputed on both sides does not lessen the requirement that it be handled and litigated in conformity with the express requirements of the Rule.

Indeed, the terms of the release given in return for the payment in question would indicate that all of Atlas' invoices on both Benning and Campbell were in dispute (R. 28):

RELEASE OF ALL CLAIMS

> "For and in consideration of the payment by Southern Construction Co., Inc. of the sum of $35,000.00, the receipt of which is hereby acknowledged the Undersigned, Atlas Supply Company does hereby release, satisfy and discharge Southern Construction Co., Inc., its agents and employees from and against any and all claims of whatsoever kind or character, *which claims are disputed and denied,* arising out of, or in any way connected with, or which might arise hereafter out of, the rehabilitation of Barracks, Mess Halls and Bachelor Officer's Quarters at Fort Campbell, Kentucky, *Fort Benning, Georgia,* under contracts with the U.S. Army, on which contracts Southern Construction Co., Inc. was Prime Contractor and S. J. Pickard doing business as Pickard Engineering Company was Sub Contractor." (Italics supplied)

Likewise, the existence of a dispute regarding one part of the claim does not permit the claimant or the

Court arbitrarily to allocate a payment to an alleged undisputed portion, after the inception of the litigation, in derogation of the plain demands of the Rule. It is well-settled that the power of the parties to allocate ceases after litigation has been instituted. "It is certainly too late for either party to claim the right to make the appropriation after the controversy has arisen, and, *a fortiori*, at the time of trial." *United States* v. *Kirkpatrick*, 22 U.S. 720, 738; 6 L. Ed. 199, 203; *Austin* v. *Southern Home Association*, 122 Ga. 439, 449, 50 S.E. 382; *Weaver* v. *Ogle*, 2 Tenn. App. 563 (1926).

It should be noted that the record does not define the nature of the dispute in question, beyond the mere assertion of it, nor does it clearly show the extent to which it affected the Benning (Georgia) account. There is strong evidence indicating that if it existed at all, it was only to the extent of $52,000 of the $104,197.12 owed on the Benning account; and also that even this disagreement was resolved by a payment of $100,000 in December, 1958, long before the counterclaim item of $35,000 was paid in the following August. (R. 59, 60, 21)

The main point is, however, that no considerations such as the existence of a dispute concerning a portion of the claim, or such as an attempt by one of the parties to allocate a payment, where it would do it the most good, after the inception of the litigation, will be permitted to alter the express terms of the Rule. The requirement of the Rule is mandatory, carries the force and effect of a statute, and it brooks no exceptions, other than those stated in the Rule itself. Were it otherwise, parties by their actions or allegations, could set up their own exceptions, or amendments, and thus nullify the purpose of the Rule, and destroy the benefits it was intended to achieve.

There Is No Equity Working In Favor of the Petitioner In This Case

Petitioner has argued at some length that since it got no credit for the item in question in the Georgia proceeding, it should be allowed to use it in the Tennessee case; that the present application of the Rule is harsh and unjust, and that principles of equity demand that it be afforded relief.

We cannot emphasize too strongly that this is not a case where a party has overlooked a valid item of counterclaim through error, or mistake, or even negligence, although this would not change the application of the Rule. *Beloit* v. *Morgan*, 7 Wall 619, 624; 74 U.S. 619, 624; 19 L. Ed. 203, 205. In this case petitioner was fully aware of the counterclaim item at all times, and indeed originally filed the item in Georgia as the Rule required. What it now argues is that it should be permitted to thereafter survey the situation, balance the relative advantages of holding the item back in Georgia and advancing it in Tennessee, and then proceed accordingly. Petitioner was no doubt aware that the suit in Georgia involved much larger sums, and that it already had a counterclaim there of some $70,000, without this item of $35,000. It was also no doubt aware that in Tennessee the contract price itself was only for $50,000; and that without some kind of a counterclaim there was no likely defense to the Tennessee suit. Counsel for petitioner decided to take a calculated risk. In the middle of the Georgia proceedings he deleted the item in question from the proof, so that he could use it, as he then hoped, to defeat the Tennessee claim *in toto*. His testimony is that he knew that he could continue to press the item in Georgia, but that, "I came to the conclusion that I could better assert it up here."

(R. 18) He said, "* * * when I was trying to decide this issue, I was trying to do what was legally correct for my client." (R. 18) He said he reached his decision sometime between April of 1957 and August of 1958 (R. 143). It should be borne in mind, in this connection, that judgment was originally entered for respondent on the basis of the jury verdict in Georgia on March 18, 1959 (R. 44), and it was not until five months later on August 18, 1959, that the item in question was clearly introduced into the Tennessee proceedings in the form of an amended counterclaim in that case (R. 8). His client testified that the decision to transfer the item to Tennessee was the decision of his attorney, and his alone. (R. 14) Principles of equity are in no way involved here; this was a palpable legal maneuver, executed by counsel for petitioner, and at this juncture the case should be judged with this in mind. If credit was not received for the item in Georgia, it is only because counsel decided or gambled that the item had greater possibilities in Tennessee.

But even now all is not lost for petitioner in the Georgia case. A review of the current proceedings there would seem to be in order: Along with a motion N.O.V., respondent filed a motion for a new trial on its main case, and on the counterclaim, in the Georgia proceeding, immediately after judgment was entered for respondent on March 18, 1959. Action on these motions was held in abeyance by the Georgia Court. The jury in the Tennessee proceeding brought in a special verdict that was also favorable to respondent on October 6, 1959. (R. 2) On December 30, 1959, the Georgia Court issued an opinion stating it would grant petitioner's motion N.O.V., but it expressly reserved decision on the motion for a new trial on the counter-

claim. (R. 168) The judgment of the Tennessee Court entering judgment for petitioner (on the strength of the counterclaim) was entered on March 16, 1960. (R. 2) This judgment was reversed by the Court of Appeals for the Sixth Circuit on August 3, 1961; and rehearing was denied on August 30, 1961. (R. 182)

On September 1, 1961, the Georgia Court granted petitioner's motion for a new trial on the counterclaim in the Georgia case. (Exhibit "A" attached hereto) Certiorari to this Court was applied for on November 27, 1961, and was granted on January 22, 1962.

On March 2, 1962, petitioner in the Georgia proceeding filed a motion to amend the reinstated counterclaim by expressly and specifically claiming the item of $35,000. (Exhibit "B" attached hereto) On the same date it filed a motion for summary judgment on the counterclaim, as so amended. (Exhibit "C" attached hereto) Under date of August 2, 1962, the Georgia Court set these motions, and other matters pertaining to the revived counterclaim down for pre-trial hearing on August 10, 1962. This pre-trial hearing has since been postponed to a date to be hereafter fixed. (Exhibit "D", attached hereto)

The item of $35,000 has been re-introduced into the Georgia case. The amendment to the counterclaim (Exhibit "B" attached) expressly alleges that Atlas Supply Company has been paid "the sum of $35,000 in settlement of its claim against defendant on account of materials furnished to plaintiff at *Fort Benning, Georgia,* and Fort Campbell, Kentucky * * *." (Italics supplied) And the motion for summary judgment (Exhibit "C", attached) describes the cancelled check for $35,000 that was given for materials furnished at

both Benning and Campbell; an affidavit attached to the motion contains the following:

> "Deponent further says that Atlas Supply Company claimed an indebtedness by Pickard to it for materials at Fort Benning, Georgia, for use in the performance of subcontracts involved in the captioned case, in the sum of $104,000.00, and at Fort Campbell, Kentucky, in the sum of $34,520.00, prior to Pickard's default, which said indebtedness Atlas Supply Company claimed to be a liability of Southern Construction Co., Inc. under the provisions of law. Deponent further says that Southern Construction Co., Inc. settled all of said claims for the sum of $35,000.00 and paid the same by a check, a copy of which check after cancellation is attached hereto and marked Exhibit "A", and that Atlas Supply Company executed, in exchange therefor, a release, a copy of which is attached hereto and marked Exhibit "B".

In the light of the foregoing it is difficult to sympathize with the argument that petitioner should be allowed the benefit of the counterclaim item in Tennessee, since it was denied the opportunity to use it in Georgia; and it is especially difficult to accept the proposition that the payment was made for the settlement of the Fort Campbell account alone, and that no part was intended for the Benning account, because the Benning account was in dispute.

It may be the Court will feel that current developments in the Georgia proceedings have rendered this appeal moot.

CONCLUSION

It is requested that the judgment of the Court of Appeals for the Sixth Circuit be affirmed.

EDWARD GALLAGHER
500 Federal Bar Building
Washington 6, D. C.
Attorney for Respondent

Of Counsel:

GRACEY, BUCK, MADDIN & COWAN
434 Stahlman Building
Nashville 3, Tennessee

Dated at Washington, D. C., September 24, 1962.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

Civil Action No. 652

THE UNITED STATES OF AMERICA for the use of SAMUEL J. PICKARD, doing business as PICKARD ENGINEERING COMPANY, 6230 Third Street, Northwest, Washington, D. C., *Plaintiff*

v.

SOUTHERN CONSTRUCTION CO., INC., Old Savannah Road, Augusta, Georgia, and CONTINENTAL CASUALTY COMPANY, *Defendants*

Order Granting Defendants' Motion For New Trial On Defendants' Counterclaim

In this Miller Act suit the plaintiff sought to recover from Southern, the prime contractor, and its surety, $120,000.00, contending, among other things, that the defendant Southern had breached plaintiff's subcontract with Southern by failing to make payments when due and by expelling plaintiff from the job and procuring another to perform services called for by said subcontract. The defendants contended, among other things, that the plaintiff had breached its subcontract by failure to perform and actually by abandoning the work thereby necessitating Southern's completion of the unfinished work at a cost of $70,384.78 over and above the subcontract price, and by a counterclaim Southern sought recovery of said $70,384.78.

After a lengthy trial the jury awarded plaintiff $24,369.40. Thereupon the two defendants, Southern and surety, filed their motion; first, to set aside the verdict and judgment and to enter judgment in their favor on the main case in accordance with the motion for directed verdict made by the defendants at the close of all the testimony on

the grounds as stated in said motion for directed verdict; and, second, in the alternative, to set aside the verdict and judgment and grant defendants a new trial on the main case, and Southern moved separately "to set aside the verdict and judgment thereon as to its counterclaim upon all the foregoing grounds set forth in defendants' motion for new trial on the main case and on the further ground that, if either a judgment notwithstanding the verdict or a new trial is granted on the main case, as a matter of law, a new trial must be had on the counterclaim."

After carefully considering the motion for judgment notwithstanding the verdict, this court entered a memorandum opinion on December 30, 1959 setting forth the reasoning by which it arrived at the conclusion that said motion should be granted, and an order was entered March 31, 1960 granting said motion notwithstanding the verdict, reciting in said order, "the court expressly determines that there is no just reason for delay in the entry of a final judgment for the defendants on the main case and expressly directs the entry of such final judgment. The court makes no ruling at this time on the defendants' motion for new trial on the main case nor on the defendants' motion for new trial on the counterclaim." Counsel for the defendant-movant had requested of the court that the motion for new trial on the counterclaim be held in abeyance pending the disposition of a companion case between the same parties in a District Court of the United States in Tennessee. Only recently counsel for movant has invited a ruling on said motion for new trial on the counterclaim.

This motion is strenuously opposed by counsel for plaintiff, both as to its merits and upon the ground that Southern, by making a motion for judgment notwithstanding the verdict and obtaining a favorable ruling thereon, has waived any rights it might have to a new trial on its counterclaim, and that, as a matter of law, under the Rules of Civil Procedure the court, having entered a judgment notwithstanding the verdict, that is a final judgment which disposes of

the entire case, both the plaintiff's original claim and the defendant's counterclaim. This court does not so interpret the rules or the decisions. See *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956) and *Cold Metal Process Co.* v. *United Co.*, 351 U.S. 445 (1956). As was said by the Court of Appeals for the Fourth Circuit in the somewhat analogous case, *Town of Clarksville, Va.* v. *United States*, 198 F. 2d 238 (1952), such a construction of Rule 54(b) would be "a hypertechnical interpretation not in accord with its manifest spirit and purpose."

It is very probably true that the jury, having decided for the plaintiff in the main case, gave no consideration at all to the defendant's counterclaim. Indeed, if their verdict for the plaintiff in the main case were a proper verdict a failure to give consideration to defendant's counterclaim would also be proper. By the same token, inasmuch as their verdict for the plaintiff in the main case was an improper verdict (for the reasons set forth in said memorandum opinion) their failure to give consideration to defendant's counterclaim was likewise improper. And now that the verdict has been set aside the defendant's counterclaim remains undisposed of.

If, on the other hand, it could be said that as a matter of law the verdict which the jury rendered is tantamount to a finding by the jury against the defendant's counterclaim on its merits the answer is that said finding cannot be approved by the court because it is contrary to law, contrary to the evidence, and is decidedly and strongly against the weight of the evidence and without evidence to support it. In any and all events therefore, as the court sees it, the defendant Southern is entitled to a new trial upon its counterclaim. This will leave the parties in a situation somewhat comparable to the status of the parties in another Miller Act case originating and still pending in this court, *United States of America* v. *James Carter Taylor*, — F. 2d —, (5th Cir. July 26, 1961). In each case the plaintiff has had its half inning at bat, has retired scoreless and must now give the defendant its turn at bat.

In the instant case after the entry of this order the posture of the case will be quite analogous to what it would have been if the court had granted the defendants' motion for directed verdict at the conclusion of the plaintiff's evidence and had then proceeded with the trial solely upon the counterclaim.

Accordingly, Southern's motion for new trial on its counterclaim is hereby granted, the verdict insofar as it may relate to said counterclaim is hereby set aside and a new trial solely upon said counterclaim is hereby ordered.

So Ordered, this 1st day of September, 1961.

/s/ W. A. Bootle
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

Civil Action No. 652

The United States of America for the use of Samuel J. Pickard, doing business as Pickard Engineering Company, 6230 Third Street, Northwest, Washington, D. C., *Plaintiff*

v.

Southern Construction Co., Inc., Old Savannah Road, Augusta, Georgia, and Continental Casualty Company, *Defendants*

Amendment

Comes now the defendant, Southern Construction Co., Inc., in the above entitled cause, and after the grant of a motion for new trial in said cause on the counterclaim of the defendant, moves to amend said counterclaim as follows:

By striking paragraph 3 of said counterclaim and the prayers thereof in their entirety, and substituting in lieu thereof the following:

"3. Defendant has paid either to the above-named plaintiff or for the account of plaintiff prior to plaintiff's default the sum of $431,925.90, and has paid to subcontractors and materialmen in order to complete said construction after default by the plaintiff, the sum of $182,289.97, and has paid to Atlas Supply Company the sum of $35,000.00 in settlement of its claim against defendant on account of materials furnished to plaintiff at Fort Benning, Georgia and Fort Campbell, Kentucky, making a total expenditure of $614,215.87, which sum is in excess of the aggregate contract price as finally adjusted of $513,075.11 on all three of said contracts as described in paragraphs 3, 4, and 5 of plaintiff's complaint, and the plaintiff, Samuel J. Pickard, doing business as Pickard Engineering Company, is indebted to this defendant, Southern Construction Co., Inc., at the present time for the excess of $101,140.76."

WHEREFORE, defendant demands judgment against plaintiff, Samuel J. Pickard, doing business as Pickard Engineering Company, on its counterclaim in the amount of $101,140.76 plus interest and costs.

HARRY S. MCCOWEN

Address:
2634 Bank of Georgia Bldg.,
Atlanta, Georgia

HULL, WILLINGHAM, TOWILL & NORMAN

Address:
10th Floor, Southern Finance
Building, Augusta, Georgia

FOLEY, CHAPPELL, YOUNG & HOLLIS

Address:
The Fourth National Bank
Building, Columbus, Georgia

By HOWELL HOLLIS

I, Howell Hollis, of Counsel for Southern Construction Co., Inc., one of the defendants in the above entitled cause, do hereby certify that I have served the plaintiff, Samuel J. Pickard, doing business as Pickard Engineering Company, with a copy of the foregoing amendment by mailing a copy of the same postpaid to his Counsel of Record, Messrs. Martin, Snow & Grant, 503 First National Bank Building, Macon, Georgia, and Mr. Edward Gallagher, 1216 Wyatt Building, Washington 5, D. C.

This 2nd day of March, 1962.

HOWELL HOLLIS
Of Counsel for the Defendant,
Southern Construction Co., Inc.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

Civil Action No. 652

THE UNITED STATES OF AMERICA for the use of SAMUEL J. PICKARD, doing business as PICKARD ENGINEERING COMPANY, 6230 Third Street, Northwest, Washington, D. C., *Plaintiff*

v.

SOUTHERN CONSTRUCTION CO., INC., Old Savannah Road, Augusta, Georgia, and CONTINENTAL CASUALTY COMPANY, *Defendants*

Motion For Summary Judgment On Its Counterclaim By Defendant, Southern Construction Co., Inc.

The defendant, Southern Construction Co., Inc., moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment on a counterclaim heretofore filed by it as now amended, on the ground that there is no genuine issue as to any material fact, and that

the defendant is entitled to a judgment in its favor as to said claim.

* * * *

2. The sworn affidavit of Mary L. Senn, hereto attached, shows that defendant Southern after default by plaintiff Pickard, incurred costs and paid to complete said work the total sum of $147,289.97, plus $35,000.00 paid to Atlas Supply Company in settlement of its claims against Southern Construction Company arising out of Pickard's accounts at Fort Benning, Georgia and Fort Campbell, Kentucky, * * *.

* * * *

ADDITIONAL PAYMENT TO ATLAS SUPPLY COMPANY

(a) Cancelled check from Southern Construction Company to Atlas Supply Company in the amount of $35,000.00 for materials furnished to Fort Benning and Fort Campbell, accepted in full settlement and satisfaction of all claims against Southern by Atlas, copy of which is attached as "Exhibit A" to the affidavit of Mary L. Senn which is attached to this motion.

(b) Release executed by Atlas Supply Company to Southern Construction Company acknowledging the payment of $35,000.00 in settlement of Pickard's accounts at Fort Benning, Georgia, and Fort Campbell, Kentucky, a copy of which is attached as "Exhibit B" to the affidavit of Mary L. Senn which is attached to this motion.

(c) Opinion of the Sixth Circuit Court of Appeals, decided August 3, 1961, and published in 293 Federal Reporter, 2nd Series at page 493.

(d) Copy of reply brief on behalf of Pickard in the United States Court of Appeals for the Sixth Circuit, hereto attached as "Exhibit C" to this motion.

Total additional amount paid to Atlas by Southern, as per cancelled check $35,000.00

* * * *

This motion is further based upon the affidavits of R. J. Baxter, Mary L. Senn, J. T. Bryan, Jr., J. O. Hutchinson, and L. W. Proctor previously filed in this cause on the motion for summary judgment on its counterclaim by defendant Southern Construction Co., Inc. prior to the trial of said cause.

This motion is further based upon the affidavit hereto attached of Mary L. Senn.

• • • •

HARRY S. MCCOWEN

Address:
2634 Bank of Georgia Bldg.
Atlanta 3, Georgia

HULL, WILLINGHAM, TOWILL & NORMAN

Address:
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Building, Augusta, Georgia

FOLEY, CHAPPELL, YOUNG & HOLLIS

Address:
The Fourth National Bank
Columbus, Georgia

By HOWELL HOLLIS /s/

• • • •

AFFIDAVIT

STATE OF GEORGIA,
COUNTY OF RICHMOND.

Personally appeared before the undersigned, Mary L. Senn who, being duly sworn, deposes and says as follows:

Deponent is bookkeeper and office manager of Southern Construction Company, Inc. and, in that capacity, is in charge of the books and records of said Company.

• • • •

Deponent further says that Atlas Supply Company claimed an indebtedness by Pickard to it for materials at

Fort Benning, Georgia, for use in the performance of subcontracts involved in the captioned case, in the sum of $104,000.00, and at Fort Campbell, Kentucky, in the sum of $34,520.00, prior to Pickard's default, which said indebtedness Atlas Supply Company claimed to be a liability of Southern Construction Co., Inc. under the provisions of law. Deponent further says that Southern Construction Co., Inc. settled all of said claims for the sum of $35,000.00 and paid the same by a check, a copy of which check after cancellation is attached hereto and marked Exhibit "A", and that Atlas Supply Company executed, in exchange therefor, a release, a copy of which is attached hereto and marked Exhibit "B".

MARY L. SENN /s/

Sworn to and subscribed before me this 14th day of February, 1962.

MOLLY ROBERTSON

Notary Public, Richmond County, Georgia.
(Seal)

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON, GEORGIA

August 2, 1962

Mr. Howell Hollis
Columbus, Georgia

Mr. Robert G. Norman
Augusta, Georgia

Mr. George C. Grant
Macon, Georgia

Mr. Harry S. McCowen
Atlanta, Georgia

Mr. Edward Gallagher
Washington 5, D. C.

Gentlemen:

Re: Pickard Engineering Co. v. Southern Construction Co., Civil Action No. 652, Columbus, Division

I would like to pre-try the remaining issues in the above case as soon as suits the convenience of counsel. Please consider this letter as if it embodied the usual pre-trial notice. That means that you gentlemen should confer and agree as far as possible with respect to the remaining issues in this case, and prepare a proposed pre-trial order covering such agreements as you are able to accomplish.

My present thinking is that the motion to dismiss the pending motion for summary judgment will have to be overruled, and that in my view of the response to that motion, supported by Mr. Pickard's affidavit, the counterclaim probably can not be fully adjudicated on the motion. At the pre-trial, however, we should undertake to ascertain what material facts exist without substantial controversy and what material facts, if any, are actually and in good faith controverted.

May I suggest the following possible areas of agreement: Can it be agreed that in completing the work Southern made all of the expenditures listed in the motion, and does the controversy boil down only to whether or not, and to what extent, such expenditures were reasonable and necessary? Perhaps there is no contention at all with respect to the Hecht Company item of $1519.28. Perhaps the $35,000.00 Atlas item presents no factual but only a legal question. Apparently, it is agreed that the total contract price was $513,075.11, and that there was paid to Pickard, or for his benefit, prior to cessation of work $431,925.90.

Other areas of possible agreement will doubtless occur to you gentlemen.

I shall be glad to hear from you at the proposed pre-trial conference both on the pending motions and to learn the results of your pre-trial efforts.

I am setting this pre-trial for August 10th, in Macon, at 2:30 p.m., and trust that this will suit your convenience.

Very truly yours,

W. G. Bootle
United States Judge

WAB:e
cc: Mr. John P. Cowart, Clerk